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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

FONG FOO AND ROBERT KNUPP,

Petitioners,

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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Petitioners pray that a writ of certiorari issue to review the order of mandamus of the United States Court of Appeals for the First Circuit, entered in this case on February 2, 1961, setting aside a judgment of acquittal entered in favor of the petitioners by the United States District Court for the District of Massachusetts and ordering that the petitioners be tried again.

OPINIONS BELOW

There was no formal opinion of the District Court. Excerpts of the transcript in that Court, including the judge's statement on granting the judgment of acquittal, are reproduced in Appendix B to this Petition.

The opinion of the Court of Appeals has not yet been reported. It is reproduced in Appendix A to this Petition.

JURISDICTION

The Order of the Court of Appeals was entered on February 2, 1961. On February 27, 1961, Mr. Justice

Frankfurter extended the time for filing a petition for certiorari herein to and including March 15, 1961. This Court has jurisdiction to review the order herein by writ of certiorari under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

A court of appeals issues a writ of mandamus setting aside a judgment of acquittal entered by a federal district court in the trial of a criminal case on motion of the defendants, and orders that the defendants be tried again.

1. Assuming, as the court of appeals held, that the district judge had no power to grant a judgment of acquittal in the circumstances of this case, can the defendants be placed in jeopardy a second time, before another jury, although they never moved for a mistrial, and no compelling necessity existed for terminating the original trial?

2. May a court of appeals, on a petition for mandamus, review a judgment of acquittal to determine the reasons for which it was entered and:

(a) whether an acquittal for those reasons is within the power of a trial judge, and

(b) whether the facts of the case justified an acquittal for those reasons?

3. Does a district judge have the power to grant a judgment of acquittal before the prosecution has put in all of its evidence, if he believes that justice so requires for the following reasons:

(a) the testimony already presented is so contradictory and unreliable that it could not support a conviction;

(b) the prosecutor has improperly spoken to a witness, outside of the courtroom, in a manner which destroys the reliability of the witness's testimony regarding a crucial issue in the case.

STATUTES, CONSTITUTION, AND RULE INVOLVED

The Fifth Amendment to the Constitution of the United States provides in pertinent part as follows:

> "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb . . ."

The statute describing the situations in which the Government may appeal in criminal cases, 18 U.S.C. § 3731, reads in pertinent part as follows:

> "An appeal may be taken by and on behalf of the United States from the district courts direct to the Supreme Court of the United States in all criminal cases in the following instances:
>
> "From a decision or judgment setting aside, or dismissing any indictment or information, or any count thereof, where such decision or judgment is based upon the invalidity or construction of the statute upon which the indictment or information is founded.
>
> "From a decision arresting a judgment of conviction for insufficiency of the indictment or information, where such decision is based upon the invalidity or construction of the statute upon which the indictment or information is founded.
>
> "From the decision or judgment sustaining a motion in bar, when the defendant has not been put in jeopardy.
>
> "An appeal may be taken by and on behalf of the United States from the district courts to a court of appeals in all criminal cases, in the following instances:
>
> "From a decision or judgment setting aside, or dismissing any indictment or information, or any count thereof except where a direct appeal to the Supreme Court of the United States is provided by this section.
>
> "From a decision arresting a judgment of conviction except where a direct appeal to the Supreme Court of the United States is provided by this section.

"The appeal in all such cases shall be taken within thirty days after the decision or judgment has been rendered and shall be diligently prosecuted."

* * * *

The "all writs" section of the Judicial Code, 28 U.S.C. § 1651 (a), upon which the court of appeals relied for jurisdiction to issue a writ of mandamus in this case, provides as follows:

"The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

* * * *

Rule 29 (a) of the Federal Rules of Criminal Procedure, dealing with motions for judgment of acquittal, provides as follows:

"Motions for directed verdict are abolished and motions for judgment of acquittal shall be used in their place. The court on motion of a defendant or of its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment or information after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses. If a defendant's motion for judgment of acquittal at the close of the evidence offered by the government is not granted, the defendant may offer evidence without having reserved the right."

* * * *

STATEMENT

The District Court Proceedings

The petitioners here are Fong Foo and Robert Knupp, employees of Standard Coil Products Co., Inc. On September 18, 1960, the petitioners were brought to trial,

along with their employer, in the District Court for the District of Massachusetts on indictments charging them with having concealed, and conspired to conceal, material facts within the jurisdiction of a Government agency in violation of 18 U. S. C. §371 and § 1001. (R. 11) The fraud alleged related to the testing of radiosondes being manufactured at their employer's plant for the Army Signal Supply Agency. A jury was duly empaneled and sworn, and the Government began to present its case.

According to the prosecutor's opening statement, the case would consist of two parts: first, a technical explanation of how the tests were supposed to have been performed and, second, testimony as to how the tests were falsified (Tr. 2-6).[1]

With respect to the first part of its case, the prosecution called as a witness a Government employee named Paliatto, who had been stationed at the company's plant for the purposes of supervising the testing in question, and who had initiated the investigation which led to the indictment. (Tr. 362). His testimony lasted for several days. In the words of the Court of Appeals, it was "confused and conflicting." (App. A-7)[2] After he had

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[1] The transcript of testimony in the district court is a separate volume of the certified record herein, and is separately paginated. References to that transcript will be indicated by the abbreviation "Tr."

[2] Whether the confusion and conflict in this witness' testimony was caused by or was the cause of questions and comments made by the trial judge is immaterial to the questions here presented. The Court of Appeals was of the view that the trial judge was the one at fault. We believe an examination of the record will disclose the contrary.

Although the trial judge has indicated by letter to the Chief Justice that he does not wish to defend his actions—and we agree that such defense is immaterial to this case—we believe in all fairness we should point out that the characterization of the judge's conduct by the Court of Appeals was wholly unjustified. It is true that the trial judge examined the Government's witnesses extensively. It may

testified for several days, the trial judge excused the jury and suggested to Government counsel that they should consider whether to *nol prosse* the case (Tr. 371-72, App. B-2, 3). He said that, in his view, there was "no chance whatsoever that this jury would convict these defendants if a conviction required any credit of Mr. Paliatto" (Tr. 373-74, App. B-3). Further, he said, "if in the end the jury did believe this witness, I think it would be almost inevitable that I would have to set aside the verdict . . ." (Tr. 377, App. B-5). The United States Attorney objected to the suggestion on the ground that Paliatto was not a fraud witness, but only an explanatory witness, and that subsequent witnesses would adequately prove the

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even be, as the Court of Appeals stated, that "fully as many questions" were asked by the judge as by the prosecutor. We submit, however, that any fair examination of the record as a whole will reveal that virtually all of the questions asked by the judge were intended to clarify for the jury a large amount of highly technical information. It is wholly unfair to say that the judge "cross-examined" the witnesses solely out of solicitude for the accused. To the contrary, a fair reading of the record will show, we believe, that the judge was attempting to assist the jury in understanding highly technical testimony which was being poorly elicited by the prosecutor and that this attempt was at least as useful to the prosecution as to the defense.

On a few occasions the judge did lose his patience with the witnesses. On those occasions he did address them sharply and remind them of the seriousness of the business in which they were involved. There were also occasions when the judge was unable to hide his amusement over the witnesses' peculiar use of language. On the whole, however, the tone of the judge's questioning was not antagonistic, at least at the beginning. It was calculated to elicit clear and comprehensible testimony, not to intimidate, confuse, or ridicule the witnesses. Were it not for the judge's participation, we believe, the testimony would have been infinitely more confusing than it was.

Particularly instructive as to the clarification achieved by the trial judge is the episode on pages 92-93 of the transcript. Paliatto testified that the machine used to conduct the tests claimed by the Government to have been fraudulent made "spurious marks." The trial judge, after extensive questioning of the witness, was able to establish that by "spurious" the witness meant simply on the "spur of the moment"—i.e., "instantaneous."

fraud (Tr. 377-380, App. B-6, 7). But the impression created by Paliatto's testimony was ineradicable, the judge said (Tr. 381-82, App. B-8). And, as counsel for the corporate defendant pointed out, the Government had represented that Paliatto, who was the Government man actually in charge of the testing which was claimed to have been falsified, would be recalled later with respect to the fraud claimed (Tr. 383-84, App. B-9). For this reason, the judge had ruled that defense counsel should refrain from cross-examining Paliatto as to the fraud until later in the case (Tr. 30).

The Government rejected the trial judge's suggestion and the examination of Paliatto continued, with still further confusion and conflict.

After a third witness testified briefly, the Government, on the seventh day of the trial, called its fourth witness, Robert Rosenholm. Rosenholm had been named as a co-conspirator, but had not been indicted. He testified that he had been the company's "final inspector" of radiosondes. Like Paliatto, his testimony was, at least in part, self-contradictory (*Compare* Tr. 667-671 *with* 672-673).

On the afternoon of that day, while still on direct examination, Rosenholm was asked about a meeting at which the personnel manager of the plant and an attorney for the company had been present (Tr. 680 *et seq.*). He testified that this meeting had taken place in 1958, and that he wasn't sure of the month, but thought it was February (Tr. 681).

When objection was made on the ground of attorney-client privilege, the Assistant United States Attorney explained at a bench conference that the Government's theory was that, as a result of this conference, the attorney, as an agent of the company, had been apprised as to what was going on with respect to the testing of the radiosondes, and that no steps were taken by the company to remedy the situation. Moreover, he said, he would also show through

other witnesses that after he had been informed of "what was going on" the attorney attempted on behalf of the company to conceal it (Tr. 689-690). The judge then recessed the trial to permit the Government to prepare a foundation for this testimony.

When the trial resumed on September 20 Rosenholm was again asked to give his recollection of the date when the conversation with the attorney occurred. At this time he gave the date of the conversation as September 1957 (Tr. 693).

On cross-examination, Rosenholm, after first saying that he couldn't recall what had taken place an hour and a half before, admitted that he had changed the date as a result of the discussion with the Assistant United States Attorney (Tr. 705-07).

The date of the conference was highly significant. The indictment alleged that the conspiracy took place from September 1956 to November 1957. Thus, the testimony concerning the conversation with the company's attorney would be admissible only if it took place during that period.

The trial judge then excused the jury and the witness, and after expressing his belief that the prosecutor had violated an elementary rule (Tr. 708, App. B-10, 11), suggested that the situation might be such as to require him to respond to a motion (Tr. 709, App. B-12). The Assistant United States Attorney said that the actual time of the conference was not a point on which the case swung (Tr. 711, App. B-12). The court pointed out, however, that he had recessed the trial for the very purpose of permitting the Government to lay a proper foundation, if one could be laid, with regard to the admission of the testimony which the Government claimed would show that there was a continuous conspiracy involving the attorneys, the officers of the corporation, and other conspirators, as well as the defendants (Tr. 711-712, App. B-12, 13).

Counsel for the company then moved in the alternative for acquittal of the corporate defendant, or action by the court striking the testimony of the witness. Counsel for the individual defendants moved simply for a judgment of acquittal (Tr. 713, App. B-13, 14).

The trial court recalled the jury, and after absolving the United States Attorney and his Assistants of any intention of acting wrongfully, reviewed the situation as he saw it (Tr. 714, App. B-14). There had already been, he said, witnesses who showed a "lamentable lack of awareness or lack of capacity in connection with their testimonial obligations" (Tr. 715, App. B-15). He described the present witness as one who had shown "either lamentable lack of memory or an extraordinary power of inventiveness" in connection with a previous portion of his testimony (Tr. 717, App. B-17). He then concluded:

> "With due regard for the principles of justice under law, I must bear in mind not only what may be correct, but what is fair. In our constitutional system, under our jurisprudence, many things which are true are not allowed to be shown. Examples are a confession extorted by physical coercion; such a confession is not admissible although it may be perfectly correct and the defendant may be guilty. Likewise, information procured by an unlawful search and seizure may be perfectly true and the defendant may be guilty; nonetheless it is well settled that no conviction can be based lawfully upon information unconstitutionally procured by an unreasonable search or seizure.
>
> "These principles illustrate the sensitivity of American courts to fair play in connection with every aspect of the criminal law. It is not the duty of a court to see that every guilty man is punished. It is the duty of a court to see that every man gets a fair trial. The highest public interest is not the punishment of the wicked, but the establishment and maintenance of justice under law.

"Bearing in mind these principles, and responding to the motions of acquittal made by counsel for the individual defendants and the corporate defendant, I direct you at this stage to return the verdicts of acquittal with respect to each of the individuals and with respect to the corporation.

* * * *

"The COURT. The defendants will stand. [The defendants complied.] You have been acquitted by direction of the Court and by the Court. Your bail is terminated. You are free." (Tr. 717-18, App. B-17).

On September 21, 1960, the following judgment was entered on the docket:

"The Defendants, Standard Coil Products Co., Inc., Fong Foo, and Robert Knupp, having been set to a bar to be tried by a jury for the offenses of concealment of material facts and conspiring to conceal material facts in a matter within the jurisdiction of an agency of the United States in violation of 18 U.S.C. § 1001 and § 371 as charged in 9 counts, and

On September 20, 1960 upon the allowance of motions for acquittal made on behalf of each defendant, it is

ORDERED that each defendant be, and hereby is, acquitted of the offenses charges, and it is

FURTHER ORDERED that each defendant be, and hereby is discharged." (R. 50).

On September 28, 1960, the Government filed, with the District Court, a motion to vacate the judgment of acquittal and for reassignment for trial. In that motion, the Government urged (1) that the court had no authority to acquit and discharge the defendants until the evidence to be presented by the Government was closed, and that the judgment which had been entered was therefore void, (2) that the legal effect of the order, given its maximum

possible scope, "amounted to no more than the granting a motion for mistrial," and (3) that the grounds upon which the court relied were insufficient even to justify a mistrial. (R. 52). The motion was denied.

The Court of Appeals

The Government then filed a petition for a writ of mandamus in the Court of Appeals for the First Circuit. (R. 3). The petition set forth the grounds which had been urged in the District Court and prayed that the judgment of acquittal be vacated and the case be reassigned for trial. The defendants were permitted to intervene. (R. 55, 56, 58). The Court, on February 2, 1961, issued its opinion and the writ which the Government had requested. Although not requested to do so, it directed that the case be reassigned by the District Court for trial before another judge.

The majority opinion, per Woodbury, Chief Judge, recited in detail the circumstances of the trial. It concluded that it was not clear on the record whether the trial judge directed acquittal because he thought the testimony produced by the Government was not entitled to belief, or because he thought the action of the Assistant United States Attorney deprived the defendants of their rights. In either case, it held, his action was not only erroneous but "beyond his jurisdiction." (App. A-7).

As to the first possible ground, the Court was extremely critical of the trial judge. Although acknowledging that the testimony of the two principal witnesses "was certainly confused and conflicting," it concluded that the confusion and conflicts were, at least in part, generated by the questions asked by the trial judge. The witness' memories, the Court of Appeals agreed, "were not entirely reliable" and "they were not masters of the English language," but the trial judge was required to accept the witnesses as they were and should not have engaged in sharp, persistent ques-

tioning which only succeeded in further confusing them and disrupting the Government's case. (App. A-7, 8).

As to the second possible ground for the trial court's action, the Court of Appeals saw no conceivable basis for it. The Court conceded, although it specifically did not decide, that a judgment of acquittal "might be warranted in the event that deliberate misconduct of Government counsel is so outrageous as not only to render the trial in progress unfair but also to make a fair trial in the future impossible." (App. A-10, n. 5). It concluded, however, that the Assistant United States Attorney was not guilty of any misconduct or impropriety, and even if he had been the most the defendants would be entitled to in this case would be an order of mistrial. (App. A-10).

Having determined that the trial judge had erred, the court then turned to the question of whether it had power to correct the error. It conceded that, in view of the inability of the Government to appeal, error by the trial court in exercising its powers was not reviewable. The only possible basis for action was exercise by the trial judge of a power he did not possess. The trial court clearly had power to order an acquittal, under Rule 29(a) of the Federal Rules of Criminal Procedure, after the Government had closed its case. And the Government conceded (although the Court of Appeals did not decide), that such an order might be entered before the close of the Government's case if it were clear that, irrespective of the evidence to be produced later, what had already transpired made a conviction impossible. This was not the situation here, the Court of Appeals concluded, and therefore it did not have to decide whether under any circumstances a trial judge had power to enter a judgment of acquittal prior to the close of the Government's case. (App. A-11, 12).

The Court of Appeals proceeded to conclude, nevertheless, that under the circumstances of the present case the Court had no power to enter a judgment of acquittal

and that mandamus was a proper remedy to correct the purported exercise of that power. The court based this conclusion on two cases, *Ex Parte United States*, 242 U.S. 27 (1916), and *Ex Parte United States*, 287 U.S. 241 (1932). In the first case, which the court conceded was not in point, this Court had held that a district judge had no power to suspend a mandatory sentence, and that mandamus would lie to require the judge to vacate the order of suspension. Primarily relied upon by the Court of Appeals was the observation by this Court, in that case, that if the legislative command fixing a specific punishment could be set aside it would follow that a trial judge could refuse to treat as criminal an act which the legislature had so designated. (App. A-12).

More nearly in point, the Court of Appeals said, was the second case entitled *Ex Parte United States*. In that case this Court had issued a writ of mandamus directing a district judge to issue a bench warrant which he had refused to do despite the fact that an indictment had been returned by a properly constituted grand jury. That case, the Court of Appeals said, established that the writ of mandamus was available in aid of its appellate jurisdiction and established "the necessity for issuing the writ" to confine trial judges within their jurisdictional limits. (App. A-13). Then arguing by analogy, the court concluded that if a trial judge does not have the power to prevent the arrest of one properly accused of crime, or to refuse without valid reason to try a criminal charge, it followed that a trial judge had no power "arbitrarily to halt the trial of the accused when the Government has only begun to present its evidence of guilty. "We see no difference in principle between blocking a criminal trial at the threshold and blocking it when the Government has barely had a chance to put its toe in the door." (App. A-15).

Having thus decided that it had the power to set aside the judgment of acquittal, the court then addressed itself

to the question of double jeopardy. It conceded that it would be pointless to issue the writ of mandamus if the plea of *autrefois acquit* would be available on a second trial. But, it concluded, since the trial judge had no power to enter a judgment of acquittal there would be no basis for a claim of double jeopardy. (App. A-15, 16). (The difference, for double jeopardy purposes, between a first trial blocked "at the threshold" and one blocked after the Government had "put its toe in the door" was not discussed by the court.)

Judge Aldrich, although concurring in the result, differed sharply from the reasoning set forth in the majority opinion. Unlike the majority, Judge Aldrich affirmatively held that a trial court did have authority to enter a judgment of acquittal at any stage at which a fatal deficiency in the Government's evidence appeared. That being so, he concluded, and the decision of the trial judge not being reviewable, it would follow that a judgment of acquittal, no matter how erroneous, on the basis of the trial judge's determination that there was a fatal deficiency in the Government's case could not be vacated by way of mandamus. (App. A-18).

The considerations were different, Judge Aldrich argued, with respect to the claim of misconduct by Government counsel. True, the trial court clearly had the power to determine that the conduct of counsel was improper, and the power so to determine necessarily included the power to determine erroneously.

But Judge Aldrich concluded that "what corrective steps the court should take after its determination of a procedural error is a separate question." (App. A-18). Even assuming that the prosecutor had violated a rule of conduct in speaking to the witness, Judge Aldrich held that this misconduct did not justify an acquittal because it was "anything but deliberate," and it was not prejudicial to the defendants. Since the date was "a preliminary matter, its present effect . . . upon the trial was nil. Its future

effect was entirely in the control of the court, who could exclude any further evidence relating to this as yet undisclosed conference." (App. A-20, 21). Therefore Judge Aldrich concluded:

> "Under these circumstances I do not think that the court had any more power to order an acquittal than it would have had on the basis of some rule of thumb that more than three Government questions, asked in good faith be regarded by the court as irrelevant, had undoubtedly delayed the trial." (App. A-21).

Under Judge Aldrich's view, it was critical to determine whether the trial judge had entered the judgment on the basis of his conclusion concerning the evidence or on his view as to Government counsel's misconduct. Concluding that the record showed that the judge had acted because of his belief, whether erroneous or not, that the Assistant United States Attorney had conducted himself improperly, he concurred in the conclusion of the court that the judgment of acquittal was beyond the trial judge's power, that it should be set aside, and that the defendants should be tried again.

REASONS FOR GRANTING THE WRIT

In this case, for the first time in the history of federal jurisprudence, a court of appeals has set aside a judgment of acquittal entered in a criminal case by a competent tribunal and ordered a new trial.

The defendants, who were brought to trial once, and who were told that they were acquitted, are now once again "in jeopardy of life or limb." Obviously, this case bristles with new and important questions of federal law which should be decided by this Court.

1. The first question involved in this case is already pending before this Court in *Gori* v. *United States*, No. 486 (certiorari granted Dec. 12, 1960). In that case, a trial judge declared a mistrial on his own motion because of

what he considered to be misconduct on the part of the prosecuting attorney, and the question presented is whether the defendant's plea of double jeopardy on his second trial should have been sustained, since he neither requested nor consented to the mistrial in the first case. The position of the petitioner in that case is that a defendant who has once been put to trial before a jury cannot be tried again, before another jury, unless the first trial was terminated because of some compelling necessity, *cf.* *Wade* v. *Hunter*, 336 U.S. 684 (1949) (termination of court martial trial because of overriding tactical considerations); *Simmons* v. *United States*, 142 U.S. 148 (1891) (juror disqualified); *Thompson* v. *United States*, 155 U.S. 271 (1894) (juror disqualified); *Logan* v. *United States*, 144 U.S. 263 (1892) (hung jury); *United States* v. *Perez*, 9 Wheat. 579 (1824) (hung jury), or unless the defendant himself moved for a mistrial. See dissenting opinion of Judge Waterman, 282 F.2d at 48.

In the present case, as in *Gori*, the defendants did not move for a new trial, and no compelling necessity existed for terminating the first one. Thus, even assuming that the court of appeals was correct in holding that the trial judge exceeded his power in granting a judgment of acquittal, the fact is that he did so and terminated the trial. The question thus arises whether the defendants can be tried again. The Court of Appeals ordered a new trial without even discussing this issue. It simply held, without much discussion, that the double jeopardy issue was resolved by its decision that the acquittal was a "nullity." This is plainly not a sufficient answer to the *Gori* problem, which arises even if it is assumed that the acquittal was void, merely because the original trial has been terminated, and the original jury discharged.

In the present case, unlike *Gori*, the trial judge did not act entirely on his own, but invited the defendants to make a motion. The significant fact, however, is that here, as in *Gori*, defendants did not move for or consent to a new trial.

On the contrary, if the judge had denied defendants' motion for acquittal, they would undoubtedly have elected to continue the trial, which from their point of view was developing quite favorably. This is particularly clear since the trial judge had unequivocally expressed his view that the jury could not possibly bring in a verdict of guilty, and had plainly indicated that if the jury would convict, he would probably set the verdict aside. (Tr. 377, App. B-5). It is also significant that counsel for the corporate defendant moved alternatively for an acquittal or to strike the testimony of the witness, but not for a mistrial. (Tr. 713, App. B-13, 14).

To suggest, therefore, as the Government did in the court below, that defendants consented to a new trial by moving for an acquittal is obviously to distort the concept of "consent" beyond all recognition. Indeed, there is less ground for finding any implied consent in this case than in *Gori*, since in *Gori* the defendant simply did nothing, while here the defendants moved, but *not* for a mistrial.

It is therefore plain that if *Gori* is to be reversed in this Court, then the present decision must be reversed. But, as we show below, there are additional questions presented in this case, the answers to which will not be provided by a decision in *Gori*.

These questions all relate, however, to the proper interpretation and application of the constitutional prohibition of double jeopardy and, we suggest, should be considered by the Court at the same time as it considers the narrow question posed in *Gori*.

The *Gori* case has now been set for argument, we have been informed, for the week of May 1, 1961. It is obviously impossible for this case to be ready for argument at that time. It is therefore respectfully suggested that if the Court decides to grant certiorari in this case, the *Gori* case should be put over until the 1961 term, and this case set down for argument consecutively with that case. Such a procedure,

counsel believe, will present to the Court a broader perspective on the problems involved, and will enhance the probability of consistent and sound decision.[3]

2. Perhaps the most important and fundamental question raised in this case is whether a court of appeals may, on a petition for a writ of mandamus or otherwise, review and set aside a judgment of acquittal, and order the defendant retried. As this Court stated in *Green* v. *United States*, 355 U.S. 184, 188 (1957):

> "... it has long been settled under the Fifth Amendment that a verdict of acquittal is final, ending a defendant's jeopardy, and even when 'not followed by any judgment is a bar to a subsequent prosecution for the same offense.' *United States* v. *Ball*, 163 U.S. 662, 671. Thus it is one of the elemental principles of our criminal law that the Government cannot secure a new trial by means of an appeal even though an acquittal may appear to be erroneous. *United States* v. *Ball*, *supra*; *Peters* v. *Hobby*, 349 U.S. 331, 344-345. Cf. *Kepner* v. *United States*, 195 U.S. 100; *United States* v. *Sanges*, 144 U.S. 310."

The dissenters in the *Green* case did not disagree with

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[3] The desirability of simultaneous consideration by this Court of this case and the *Gori* case is indicated by the inconsistent views as to the trial court's function expressed by the Government in the two cases. In the *Gori* case the thrust of the Government's position is that the authority of the judge over the conduct of the trial is not subject to review. As the Government asserted in its brief in opposition: "A trial judge must be the ultimate arbiter." (No. 486, Brief in Opposition, p. 7.) In this case, on the other hand, the Government urged in the Court of Appeals that it had a fundamental right to try its case and that action by the trial judge which arbitrarily shut it off from doing so could be reversed. The difference, obviously, is that in *Gori* the Government is seeking to sustain the trial judge's announced expectation when he declared a mistrial that the defendant would be tried again, while in this case the Government is trying to defeat the judgment of the trial judge that the defendants should go free.

the majority on this score. Indeed, the dissenting opinion, which was written by Mr. Justice Frankfurter, emphasized that the main object of the constitutional protection against double jeopardy was to prohibit a new trial after an acquittal, and on that basis differed with the majority as to the impact of the rule in a situation where a defendant appeals from a conviction. Referring to the original discussions in the House of Representatives on this portion of the Bill of Rights, Mr. Justice Frankfurter pointed out that it was agreed "that although *of course there could be no second trial following an acquittal*, the prohibition should not extend to a second trial when a conviction has been set aside." 355 U.S. at 202 (emphasis added). See also *Umbriaco* v. *United States*, 258 F.2d 625, 626 (9th Cir. 1958), in which the court held:

> "an appeal from a judgment of the trial court acquitting a defendant because of insufficiency of the evidence has never been permitted in the Federal Courts. It seemed so elementary that we are surprised to find such a right asserted in this case."

The court of appeals in the present case was well aware of the ancient doctrine that even erroneous judgments of acquittal are final and unreviewable, but ruled that an exception exists when the entry of a judgment of acquittal is not only "erroneous" but beyond the "power" or "jurisdiction" of the trial court. Is this entirely novel limitation on the previously absolute rule that judgments of acquittal by a competent tribunal are final consistent with the constitutional protection against double jeopardy?.

The court of appeals simply assumed, without much discussion, that there is no difference between setting aside a judgment of acquittal and setting aside any other order which was beyond the power of the district judge, such as the suspension of a mandatory sentence, *Ex Parte United States*, 242 U.S. 27 (1916), or the refusal to issue a bench warrant, *Ex Parte United States*, 287 U.S. 241 (1932). In

neither of these cases, however, was there any problem of double jeopardy involved, since in one case the defendant had been convicted (or, as it happened, had pleaded guilty), and in the other the defendant had not yet been brought to trial. There was thus no constitutional impediment to appellate review, by way of mandamus or otherwise, in either of those cases.

The present case, on the other hand, presents a very real constitutional problem. Whenever a motion for a judgment of acquittal is made, the trial judge must determine, along with all other questions, whether in the particular situation presented he has the "power" to grant the judgment. This is a question of law, like any other. What the Court of Appeals has held in this case is that the judge's determination of that particular question is subject to review—and if the appellate court disagrees with the judge, the defendants may be retried—although the judge's resolution of any other question of law must be final, regardless how erroneous it might have been. Whether that decision was right or wrong, it represents such an enormous modification of the principle that there can be no appellate review of a judgment of acquittal that it should be reviewed by this Court.

3. At least as important as the question of whether a court can examine a judgment of acquittal at all to determine whether the judge who entered it acted beyond his power, is the corollary question, also presented in this case, of how the court should make such a determination. In other words, what are the criteria by which a reviewing court is to decide, in this case or any other case, whether the trial judge did or did not have the power to enter a judgment of acquittal?

Suppose, for example, that a trial judge enters a judgment of acquittal on the ground that the prosecution did not prove a certain fact, which we will call X, which the trial judge holds to be an essential element of the crime. If the

court of appeals is of the view that X is not part of the crime which the prosecution must prove, may it then set aside the acquittal as having been beyond the "power" of the district judge?

Obviously, the answer is no. To hold that all acquittals based on erroneous decisions of law are reviewable and reversable in a court of appeals would be to repeal entirely the protection against double jeopardy.

Thus, in our hypothetical case, even "if directing the verdict was wrong, it certainly was not beyond the jurisdiction of the court." *United States* v. *Weissman*, 266 U.S. 377, 379 (1924).

How then does one distinguish between erroneous judgments of acquittal and those which are beyond the power of the court? The court of appeals in this case has provided no satisfactory answer.

In its brief to the court of appeals, the Government urged that some limitation on the power to grant acquittals must exist, and some remedy must be available to the Government to enforce that limitation. Otherwise, argued the Government, a district judge might acquit a defendant on the ground that he is a close friend of the judge. This, the Government argued, is certainly beyond the judge's power.

The argument is not lacking in appeal, but upon analysis, it presents great difficulties. Is there really a difference in kind, or only one of degree, between an erroneous holding that X is an essential element of a crime and a holding that being a friend of the judge is a defense to the crime? We find it difficult to articulate a distinction, unless it be based on the good faith of the judge. Perhaps in the "friend of the judge" case that test is relatively easy to apply, but how is it to be applied in real cases—and in this case?

Putting aside the question of the judge's honesty, the cases can only be distinguished by saying that one is merely error, while the other is outrageous error. That, apparently, was the basis for the court of appeals' decision in this case.

It held, in effect, that a trial judge has the power to make errors, but not errors which a reviewing court considers outrageous.

Thus, the court of appeals specifically stated that it was not holding that the entry of a judgment of acquittal prior to the close of the prosecution's case, on the ground of insufficient evidence, is always beyond the power of the trial judge. Indeed, the court pointed out that the Government had conceded that "judgment of acquittal might properly be entered in some situations even before the close of the Government's case." (App. A-11). Yet the court held that the judgment of acquittal in this case was beyond the judge's power because it was granted "on evidence showing no defense and long before the Government had had an opportunity to show whether or not it had a case. . . ." (App. A-12).

Similarly, the court did not hold that misconduct of the prosecutor can never be "so outrageous as not only to render the trial in progress unfair but also to make a fair trial in the future impossible." (App. A-10 n. 5). Rather, it held only that in this case "the Assistant United States Attorney was not guilty of misconduct or impropriety, and even if he had been it would seem that the most the defendants would be entitled to would be an order of mistrial." (App. A-10).

In short, the court of appeals did not say that the judge can never enter a judgment of acquittal on either of the grounds on which the trial judge relied, but held simply that in this case the circumstances did not call for such action. It would seem to follow that if the court of appeals could set aside the judgment of acquittal here, it can do so whenever it feels that the trial judge not only erred, but erred outrageously.

Judge Aldrich, who wrote a separate concurring opinion, seemed aware of this difficulty. He reasoned that if a

trial judge finds, prior to the close of the Government's case, that the evidence will not be sufficient to support a conviction, then the judge surely could grant an acquittal. That being so, he concluded, an appellate court could not review such a determination, no matter how erroneous it might appear. However, Judge Aldrich took the view that the acquittal in this case was based not on the insufficiency of the evidence, but merely on the alleged misconduct of the prosecutor. While the court of appeals could not reverse the trial judge on the question of whether the prosecutor's conduct was improper, it could set aside the acquittal if it concluded that the prosecutor's action, even if improper, was not prejudicial. On this basis, Judge Aldrich concurred in the result reached by the majority.

Obviously, the scope of review which Judge Aldrich would permit is somewhat different from that permitted under the majority opinion. His approach, however, presents other problems. How does one determine the basis on which the trial court granted an acquittal? Where there is an ambiguity, as apparently the majority felt there was here, does the Government or the defendant get the benefit of the doubt? Are criminal defendants henceforth going to be required to prove to a court of appeals that their acquittal was based on proper grounds to avoid being retried? What would happen if the judge merely granted a motion for acquittal, without comment or explanation?

Plainly, the majority and concurring opinions in the court of appeals are in a large measure in conflict with each other, and both leave major questions unanswered. The court of appeals has thus opened the way for other courts to review judgments of acquittal, without establishing clearly the limitations of such review. This Court should not allow such a situation to continue, where basic constitutional rights are at stake. The defendants in this case, as well as defendants in other cases which will inevitably arise, should be given the benefit of the judgment of this Court on the

important questions involved here before they are put in jeopardy a second time.

4. Assuming that the court of appeals properly held that it could review a judgment of acquittal on a petition for mandamus to determine whether the trial judge had exceeded his power, and assuming that some satisfactory criteria defining the power of the trial judge to grant such a judgment either exist or can be devised, the question arises whether the trial judge in fact exceeded his power in the circumstances of this case. This question, in itself, merits the consideration of this Court.

This case is not one where a trial judge wilfully abused his judicial office by granting an acquittal for some corrupt or irresponsible reason, although even such a case would not be free of difficulties, as we have seen. In the present case a conscientious judge, with the highest reputation for competence and integrity, concluded after many days of trial that in the interest of justice the defendants should be acquitted. An equally respected court of appeals held otherwise. This, in itself, indicates both the importance and the difficulty of the problem.

We are met at the threshold with the question whether, in any circumstances, the trial judge can acquit before the prosecution has rested. Rule 29 of the Federal Rules of Criminal Procedure does not in terms authorize such action. The majority in the court of appeals found it unnecessary to face the issue. The Government conceded, and Judge Aldrich held, that in some circumstances, at least, a trial judge may acquit at that stage, but that no such action was justified in this case.

Not unrelated to the matter of timing is the question whether a trial judge has broad power to grant a judgment of acquittal when he feels that justice so requires, or whether the power to acquit exists only in certain specific circumstances. Both of the opinions in the court of appeals seem to imply that the principal remedy available to defendants

who have not received a fair trial is the mistrial (a remedy which, incidentally, is not expressly provided for at all in the Federal Rules of Criminal Procedure), and that the judge cannot acquit the defendants simply on the ground that the prosecutor has not tried them fairly. This view appears to conflict with the view of the Ninth Circuit that

> "To prevent possible prejudice on trial beyond the general atmosphere of impartiality which traditionally pervades the courtroom, trial judges have wide discretion to methods of control. Among these are direction of mistrial, order to the jury to return verdict of acquittal and grant of new trial.
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> * * * *
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> . . . from none of these enumerated orders, made after empanelment of the jury, could the prosecution have review." *United States* v. *Heath*, 260 F.2d 623, 626-27 (9th Cir. 1958).

There can be no dispute that, in the words of the trial judge,

> "It is not the duty of a court to see that every guilty man is punished. It is the duty of a court to see that every man gets a fair trial. The highest public interest is not the punishment of the wicked, but the establishment and maintenance of justice under law."

Can this function be properly fulfilled if the trial judge lacks the power to acquit after two key witnesses have shown "a lamentable lack of awareness or lack of capacity in connection with their testimonial obligations" and the prosecutor has engaged in what the judge considers to be serious and prejudicial misconduct? If we were to assume that this trial had taken place after two, three, or four prior mistrials, would the judge still lack the power to acquit? Would ordering still another trial then be the only way in which the trial judge could assure "the establishment and maintenance of justice under law?"

If the answer to these questions is yes, as the court of appeals seems to say, then perhaps the trial judge was in error in assuming that the primary duty of a court is "to see that every man gets a fair trial," not "to see that every guilty man is punished." But whether the trial judge or the court of appeals was correct, the question whether a judge has the power to grant a judgment of acquittal, even before the prosecution has finished its case, when he feels, all things considered, that the interest of justice so requires, is itself an important question of federal law deserving of review in this Court.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for certiorari should be granted, that the argument in No. 486 should be postponed, and that the two cases should be set for argument consecutively.

Respectfully submitted,

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APPENDIX A

United States Court of Appeals
For the First Circuit

No. 5755, Original

In the Matter of
UNITED STATES OF AMERICA,
PETITIONER

PETITION FOR WRIT OF MANDAMUS.

Before WOODBURY, *Chief Judge*, and HARTIGAN and ALDRICH, *Circuit Judges*.

Elliot L. Richardson, United States Attorney, with whom *George C. Caner, Jr.*, and *Joseph S. Mitchell, Jr.*, Assistant U. S. Attorneys, were on brief, for petitioner.

James D. St. Clair, with whom *Blair L. Perry* and *Hale and Door* were on brief, for Standard Coil Products Co., Inc., intervenor.

Samuel E. Angoff, with whom *Grant, Angoff, Goldman & Manning* was on brief, for Robert Knupp and Fong Foo, intervenors.

OPINION OF THE COURT

February 2, 1961

WOODBURY, *Chief Judge*. This is a petition by the United States for a writ of mandamus directing a judge of the United States District Court for the District of Massachusetts, and also that District Court, to vacate a "Judgment of Acquittal" entered by the judge in a criminal case, to reassign the case for trial, and for such other and further relief as this court may deem just.

A grand jury in the court below returned an indictment in nine counts against Standard Coil Products Co., Inc., an

Illinois corporation, which at the time covered by the indictment had a manufacturing plant in North Dighton, Massachusetts, and two individuals then employed by it at that plant, one as the Chief of its Quality Control Department and the other at first as a supervisor and later as the foreman in charge of the production of certain electronic instruments to be described presently, charging all three with the offenses of concealing material facts and conspiring to conceal material facts in a matter within the jurisdiction of an agency of the United States in violation of Title 18 U.S.C. § 1001 and § 371. More specifically the charges were that from September 1956 to November 1957 the accused had knowingly and wilfully falsified, and conspired between themselves and with others to falsify, tests of radiosondes [1] being manufactured at the time in the plant at North Dighton under two contracts entered into by Standard Coil Products Co., Inc., with the Army Signal Supply Agency.

Motions to dismiss the indictment were denied and the defendants were set to the bar to be tried by jury on their pleas of not guilty.

One of the two Assistant United States Attorneys who represented the Government at the trial made an opening statement to the jury in which he explained the general nature of the charges laid in the indictment and the evidence he proposed to introduce saying that the presentation of the Government's case would fall naturally into two parts, the first part consisting of evidence explanatory of the instruments and of the procedures for testing them and the second part consisting of evidence of deliberate and conniving falsification of the tests run on the instru-

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[1] These are electronic devices for furnishing weather data designed to be dropped from airplanes in remote places and while floating to earth by parachute to transmit continuous radio signals in Morse Code indicating the temperature, pressure and humidity of the air through which they pass.

ments by the defendants. In carrying out this program the Assistant United States Attorney in charge at the trial called a witness through whom he introduced the contracts and related documents under which the radiosondes were manufactured by Standard Coil Products Co., Inc. He then called the "Quality Assurance Representative" of the Army Signal Supply Agency who had been stationed at the corporate defendant's North Dighton plant during the time involved for the purpose of supervising the inspection of radiosondes by plant personnel. An examination of the record shows that while this witness was on direct examination he was asked fully as many questions by the judge as by the Assistant United States Attorney. Moreover, the judge on several occasions, both during direct and cross-examination, ridiculed the witness with respect to his use of words, repeatedly corrected his grammar, and many times admonished him to remember that he should be careful in his statements since he was testifying in a criminal case. As the examination of this witness proceeded the questions and sometimes sharp comments of the judge clearly show that he considered the witness's testimony unworthy of belief.

The Assistant United States Attorney next called a witness who briefly identified certain charts to be used by subsequent witnesses as "chalks" and then called a witness to the stand who identified himself as having been the "final inspector of radiosondes" employed by the corporate defendant at its North Dighton plant during the period covered by the indictment.

The direct examination of this witness closely followed the pattern of the direct examination of the government inspector. Toward the end of a day, while still on direct examination, this witness was asked for the date of a conference he had been invited to attend at the plant office with counsel for the corporate defendant. He said at first that he did not remember the date but when pressed for

his best recollection he said that he thought the meeting was early in 1958, he believed in February but was not sure. That is to say, he put the date of the conference after the period covered by the indictment. The next morning, while still on direct examination, the witness was again asked if he was certain of the date of the conference and he again said he was not. On being asked once more for his best recollection he said, "Approximately September 1957." The judge then asked the witness if he had talked with government counsel while testifying in the case, and the witness saying that he had, the judge remarked that in a criminal case that was not "correct."

A little while later, on cross-examination by counsel for the corporate defendant, the witness admitted that he had changed his testimony as to the date of the meeting as a result of a conference with one of the Assistant United States Attorneys during the preceding over-night recess. The judge then excused the jury and asked the Assistant United States Attorney involved if he wished to make any statement "as a matter of personal privilege." The latter answered that he was unaware of any reason why he should not talk with his own witness during a recess called in the course of the witness' direct examination and expressed astonishment that the judge should think that there was any impropriety in his having done so. The judge then ordered the witness to leave the courtroom and the Assistant United States Attorney, again having expressed ignorance of any impropriety in what he had done, the judge said, "You will very soon learn," and addressed the Assistant United States Attorney as follows:

> "You were here and you knew he was on the stand. You knew there was a recess. You know the principle that a witness must be examined in public. You know that, without suggesting for a moment that you offered any improper inducement, tampering with a witness is one of the most dangerous things in connection with

> a case, and particularly a criminal case, that a person should be left entirely alone during the course of his testimony. You must know that elementary fact and elementary rule."

During further colloquy in the same vein the judge said that he did not mean that counsel for the Government were "personally deliberately" doing something they "knew to be wicked," and that he was not "proposing to take any disciplinary action" against them but was only interested in finding out whether the "situation" was one in which he "must respond to a motion." After more colloquy in the course of which the judge again suggested that the "situation" might require him to act "in response to a motion," counsel for each defendant moved orally for judgment of acquittal. Counsel for the Government strenuously opposed these motions on the ground that the witnesses so far heard were not vital to the case but were primarily intended only to lay the basis for concrete testimony of guilt to follow and that there were many government witnesses in attendance in the courtroom yet to be heard for whose credibility he was ready to vouch. He suggested that the most that should be done would be to strike the testimony of the witness under examination.

At the conclusion of the Assistant United States Attorney's remarks the judge recalled the jury, ordered the witness back to the stand, and opened a statement to the jury as follows:

> "Mr. Foreman and Members of the Jury, before I say anything else, let me make it absolutely clear that counsel for the defendants as well as the Court are persuaded that neither the United States Attorney[2] nor either of his assistants consciously or deliberately violated any canon with which they were familiar.

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[2] The United States Attorney himself had joined his two assistants in the courtroom during the course of this trial.

> They were acting subjectively in good faith, and I do not mean at any stage of the remarks I am about to make to criticise them in the sense that I believe that they were conscious wrongdoers."

Following this the judge implied that he considered the Assistant United States Attorney's conference with the witness during recess a serious infringement of the defendants' civil rights and that he regarded the testimony of the two principal witnesses so far produced by the Government to be wholly unworthy of belief, saying that both showed on the stand "a lamentable lack of awareness or lack of capacity in connection with their testimonial obligations" and that the witness then on the stand "has shown either lamentable lack of memory or an extraordinary power of inventiveness."

At the conclusion of his remarks the judge said to the jury that acting in response to the motions for acquittal made by counsel for the individual defendants and the corporate defendant, "I direct you at this stage to return verdicts of acquittal with respect to each of the individuals and with respect to the corporation." The judge then directed the defendants to stand up and announced, "You have been acquitted by direction of the Court and by the Court. Your bail is terminated. You are free." [3]

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[3] On the next day judgment was entered as follows:

> "The Defendants, Standard Coil Products Co., Inc., Fong Foo, and Robert Knupp, having been set to the bar to be tried by a jury for the offenses of concealment of material facts and conspiring to conceal material facts in a matter within the jurisdiction of an agency of the United States in violation of 18 U.S.C. 1001 and 371 as charged in 9 counts, and
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> On September 20, 1960, upon the allowance of motions for acquittal made on behalf of each defendant, it is
>
> ORDERED that each defendant be, and hereby is, acquitted of the offsenses charged, and it is
>
> FURTHER ORDERED that each defendant be, and hereby is, discharged."

We cannot be sure whether the judge directed acquittal of the defendants because he thought the testimony of two of the four witnesses put on by the United States at the outset of the trial was not entitled to belief or because he thought the action of the Assistant United States Attorney in talking with a government witness during a recess called while the witness was on direct examination deprived the defendants of some basic civil right. But whether the judge acted as he did for one reason or for the other, or for both reasons in combination, we think his action was not only plainly erroneous but beyond his jurisdiction.

The testimony of the two principal witnesses to whom we have specifically referred was certainly confused and conflicting. But, although to an appellate court the record of a trial may be "cold," it can nevertheless be clear; and it is clear from the record before us that the confusion and conflicts in these witnesses' testimony was due in no minor part to the trial judge's persistent, sharp and sometimes caustic cross-examination throughout their direct examination.

It is evident that the memories of the Government's witnesses were not entirely reliable, particularly as to details and it is also evident that they were not masters of the English language. But as every lawyer with trial experience knows, the witness whose memory is clear and sharp, who in court is neither over-awed nor cockily over-confident, and who has the capacity clearly to understand the questions asked and the command of language to answer briefly and accurately is indeed a *rara avis*. Cases can only be tried on the testimony of those who have knowledge of the issues, whoever they may happen to be, and all too often, indeed usually, witnesses, coming as they ordinarily do from the body of the general public, neither think nor speak with the clarity and precision of academicians. For the most part witnesses with only average education and intellectual capacity are the tools with which trial counsel

must work as best they can. Moreover, every occupation has its own vernacular. Sailors, doctors, railroad men, engineers, not to omit lawyers, and others too numerous to mention, more or less unconsciously slip into the vocabularies of their callings. Naturally witnesses can and should be required to explain the words they use. It is hardly necessary, however, to do so with ridicule or caustic criticism, or repeatedly to check a witness' use of words in reasonably common use by reference to the Oxford English Dictionary, or to require strict adherence to the rules of grammar. The bench is not an appropriate rostrum from which to teach the niceties of English grammar and usage.

It may well be that solicitude for the essential rights of an accused requires the trial judge to cross-examine government witnesses when an accused with no capacity to protect his rights insists upon conducting his own defense or when an accused is represented by wholly inadequate counsel. No such situation is before us here, however, for the accused were skillfully represented by able and experienced trial counsel who were very well qualified to preserve their client's every interest. We think it would have been far better had performance of that function been left to counsel. Trial judges must not forget that questions from the bench naturally and properly fall with great impact upon ordinary witnesses and that counsel are reluctant to object to questions asked by a judge for fear of giving offense. There can be no even give and take in court between the judge and counsel for counsel on the floor do not stand on even terms with the judge on the bench.

While performance by the trial judge of his function, indeed duty, to see that the truth is elicited ordinarily requires clarifying questions from the bench, and maybe on occasion sharp warnings, it is not his function or duty to take the conduct of a case away from counsel. Counsel, as in this case, who sees the examination of his witnesses taken over by the judge and led into matters the witnesses

were not intended to cover in their testimony and so opened for cross-examination as to those matters by the other side, finds himself in a most difficult and embarrassing situation. In the first place, it is a delicate matter about which counsel think twice to object to any question asked by a judge. In the second place, if counsel objects to judge's question on the ground that it leads the witness into matters he was not offered to testify about, counsel runs the risk, exemplified in this case, of comment by the judge before the jury implying that he is seeking to cut off legitimate inquiry. On the other hand, if counsel does not object he soon finds his witness floundering and displaying ignorance and, again as in this case, provoking critical comments by the judge either on the witness' intelligence or on counsel's failure to prepare his case.

We recognize that in the federal courts the trial judge is not relegated to the position of a mere moderator. He has the duty not only to make rulings of law but also to govern the trial to assure its proper conduct. *Quercia* v. *United States*, 289 U.S. 466, 469 (1933). Moreover upon his shoulders rests the duty to see that the trial is conducted with solicitude for the basic and essential rights of the accused. *Glasser* v. *United States*, 315 U.S. 60, 71 (1942). But when the trial judge assumes the role of counsel the adversary system breaks down into confusion worse confounded as the record in this case clearly shows.

This record provides a prime example of the consequences of over zealous participation in the examination of witnesses by the trial judge, for it is clear that the judge's sharp, persistent, sometimes almost badgering, questioning and caustic remarks first made the witnesses wary and over cautious and then confused them into inconsistencies, and in addition disrupted the orderly presentation of the Government's case according to the plan outlined to the jury by the Assistant United States Attorney by taking its witnesses into matters they were not offered

to cover in their testimony. Running cross-examination from the bench, particularly during a witness' direct examination, is an innovation in trial practice which definitely does not have the approval of this court.[4]

We are at a loss to understand the basis for the judge's criticism of the Assistant United States Attorney for talking with a Government witness during a recess. We are not aware of any rule of law, "elementary" or otherwise, or any canon of professional conduct forbidding the practice. Of course, as a matter of trial tactics, counsel ordinarily avoid talking with a witness during a recess called while the witness is on the stand so as not to provide opposing counsel with a point to argue to the jury. But tactics are one thing and rules of law and canons of ethics are quite another. There is nothing wrong that we know of in talking with a witness during intervals in his examination in court. Indeed in *Frazer* v. *United States*, 233 F. 2d 1, 2 (C.A. 9, 1956), counsel for the Government was commended for privately reminding a witness of a false statement in her testimony thereby causing her to change her testimony to conform to the truth.

The Assistant United States Attorney was not guilty of any misconduct or impropriety, and even if he had been it would seem that the most the defendants would be entitled to would be an order of mistrial.[5] *Berger* v. *United States*, 295 U.S. 78 (1935). Moreover, the judge should have allowed the jury to pass on the credibility of the Government's introductory witnesses and allowed the Government to proceed with the presentation of its concrete evidence

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[4] If cases are to be tried by the judge instead of by counsel, the rules of procedure will have to be drastically revised.

[5] Conceivably, although we have no occasion to decide and do not decide, a judgment of acquittal might be warranted in the event that deliberate misconduct of Government counsel is so outrageous as not only to render the trial in progress unfair but also to make a fair trial in the future impossible.

of the offenses charged. The question remains as to what, if anything, this court can and should do to correct the trial judge's error.

Certainly the judge's error was prejudicial to the United States. But the United States obviously cannot appeal. Nor may it resort to mandamus as a substitute for appeal. The writ is not available "to correct a mere error in the exercise of a conceded judicial power." *De Beers Consolidated Mines, Ltd.*, v. *United States*, 325 U.S. 212, 217 (1945). It is available however, to correct judicial action which is not mere error but usurpation of power, *id.* One of the writ's two traditional uses "both at common law and in the federal courts has been, in appropriate cases, to confine inferior courts to the exercise of their prescribed jurisdiction." *United States Alkali Export Ass'n, Inc.*, v. *United States*, 325 U.S. 196, 202 (1945). Therefore the distinction to be drawn is between an error in the exercise of a power conferred and an attempt to exercise a power not possessed.

There can be no doubt of the power of the court under Rule 29 (a) of the Federal Rules of Criminal Procedure to order the entry of judgment of acquittal, either on its own motion or on motion of a defendant, as to one or more of the offenses charged in an indictment or information "after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses." In spite of the clear wording of the Rule, perhaps, as the Government concedes, although again we do not need to decide and do not decide, judgment of acquittal might properly be entered in some situations even before the close of the Government's case, as for instance, when the Government's opening statement unmistakably shows that the evidence it proposes to introduce would not sustain a conviction, or when it produces evidence conclusively showing either that it has no case or that the accused has an iron-clad defense. But there is no suggestion of any

such situation here, for the judge abruptly terminated the Government's case by ordering the entry of a judgment of acquittal on evidence showing no defense and long before the Government had had an opportunity to show whether or not it had a case; and, moreover, he did so in ignorance of either the exact nature or the cogency of the specific evidence of guilt which Government's counsel said he had available and was ready to present.

Primarily on the basis of two cases to be cited and discussed presently, we think that under the circumstances of the case before us the judge had no power, that is to say, jurisdiction, to terminate the Government's presentation of its case in mid-course by entering judgment of acquittal and that the mandamus lies to correct the error.

In *Ex Parte United States,* 242 U.S. 27 (1916), the Court held that, practice in certain circuits including this one to the contrary notwithstanding, a district judge in the absence of statutory authority had no power permanently to suspend a mandatory minimum sentence of 5 years for bank fraud and that mandamus lay to require the judge to vacate his erroneous order of suspension.

In reaching this conclusion the Court adverted to the consequences of holding to the contrary, that is, of holding that an inherent judicial power could thwart a legislative determination of sentence saying:

> "[I]f it be that plain legislative command fixing a specific punishment for crime is subject to be permanently set aside by an implied judicial power upon considerations extraneous to the legality of the conviction, it would seem necessarily to follow that there could likewise be implied a discretionary authority to permanently refuse to try a criminal charge because of the conclusion that a particular act made criminal by law ought not to be treated as criminal. And thus it would come to pass that the possession by the judicial department of power to permanently refuse

to enforce a law would result in the destruction of the conceded powers of the other departments and hence leave no law to be enforced."

A later case of the same name, *Ex Parte United States*, 287 U.S. 241 (1932), is more nearly in point. In that case the Court issued its writ of mandamus ordering a district judge to issue a bench warrant, which he had refused to do in the purported exercise of his discretion, for the arrest of one under an indictment "fair on its face" returned by a properly constituted grand jury. The case cited is particularly significant in that it shows that issuance of mandamus by this court in the present case would be in aid of our appellate jurisdiction, and also shows the jurisdictional limits of a trial judge's powers in criminal cases and the necessity for issuing the writ to confine trial judges within those limits.

In the first place, since the Court in the case cited above was expressly exercising the original jurisdiction conferred upon it by § 262 of the Judicial Code (the forerunner of present § 1651 (a) of Title 28), we, as an intermediate appellate court, can safely rely upon it as direct authority for our issuance of the writ in aid of our appellate jurisdiction. See Chief Judge Magruder's discussion in *In Re Josephson*, 218 F.2d 174, 177-180 (C.A. 1, 1954). If, in spite of the fact that an accused may ultimately be found not guilty, the Supreme Court of the United States, in the exercise of its ultimate discretionary jurisdiction to review actions of the inferior federal courts by certiorari, has power in its discretion to issue mandamus to a federal district court ordering the arrest of one properly charged with crime by a grand jury, then this court, in the exercise of its direct appellate jurisdiction, must also have discretionary power to issue mandamus to require a district judge, or court, to permit the United States to at least present its evidence of guilt when an accused properly

charged with crime has been brought to trial. There is thus no need for us to consider whether authority to issue the writ in aid of our jurisdiction might also be found in *Roche* v. *Evaporated Milk Ass'n*, 319 U.S. 21 (1943), or *La Buy* v. *Howes Leather Co.*, 352 U.S. 249 (1957).

In the second place the considerations on which the Court relied in *Ex Parte United States*, 287 U.S. 241, 249-251 (1932), for its conclusion that the district judge did not have jurisdiction to deny the Government's petition for a bench warrant for the arrest of one properly charged with crime support our conclusion that the district judge in the situation before us did not have jurisdiction to prevent the United States from going on with the presentation of its evidence of guilt. We have specific reference to the statement on page 250 that a proper indictment returned by a properly constituted grand jury[6] "conclusively" determined the existence of probable cause for holding the accused to answer to a charge of crime and also to the statement on page 249 that the effect of the refusal of the district court to issue a warrant for the arrest of one charged in "an indictment fair upon its face and properly found and returned is equivalent to a denial of the absolute right of the government, as matters stand, to put the accused on trial. . . . The mere statement discloses the gravity and public importance of the question. It is obvious that if a like attitude should be taken by district courts generally, serious interference with the prosecution of persons indicted for criminal offenses might result."

These observations, and others we might quote from the same opinion and the cases cited therein, are pertinent here. If, under the circumstances disclosed by the record before us, a district judge for no good reason can halt the presentation of the Government's evidence in a criminal case and

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[6] We can say the same for the indictment in the case at bar. At least there is no suggestion to the contrary and motions to dismiss the indictment were denied by the district judge.

enter judgment of acquittal, the action of the grand jury in returning the indictment would be just as much flouted, and the Government fully as frustrated in the performance of its duty to prosecute persons regularly and properly charged with crime as though the judge at the outset had refused to issue a bench warrant for the arrest of the accused. The action of the trial judge in one situation falls as little short of a refusal to permit enforcement of the criminal law as in the other. See *id.* at page 250. Though the situations are different they are clearly comparable.

The industry of counsel and our own research has unearthed no case squarely in point. But if a trial judge does not have the power to prevent the arrest of anyone properly accused of crime, as held in the later case entitled *Ex Parte United States*, cited above, or to refuse for no valid reason ever to try a criminal charge as indicated in the earlier case of the same name, also cited above, it seems to us to follow that a trial judge has no power arbitrarily to halt the trial of an accused when the government has only begun to present its evidence of guilt. We see no difference in principle between blocking a criminal trial at the threshold and blocking it when the government has barely had a chance to put its toe in the door.

The question of double jeopardy remains for consideration.

Strictly speaking the defense of double jeopardy is not now before us. We can confidently anticipate, however, that the defense will be raised by the defendants by a plea of *autrefois acquit*, or former acquittal, when they are set to the bar to be tried again. Therefore, since issuance of mandamus, when within our power, is discretionary, and it would be pointless for us to issue the writ if it were a foregone conclusion that the plea of *autrefois acquit* would be good at another trial, it is appropriate here briefly to advert to the defense of double jeopardy. It will suffice for us to say that from our conclusion that the trial judge

had no power, that is to say no jurisdiction, to enter judgment of acquittal, it follows under principles too well established to require citation of authorities that the judgment is void—a nullity—and hence affords no basis for the defense of double jeopardy. See *Mitchell* v. *Youell*, 130 F.2d 880 (C.A. 4, 1942).

The United States in its application for mandamus has not specifically asked us to order that the case be reassigned for trial before another judge. Nevertheless we shall do so, for we do not see how a judge who has unnecessarily taken it upon himself to cross-examine witnesses not only extensively but also sharply can either listen to their testimony reflectively or weigh their testimony dispassionately.

Mandamus will issue directing that the judgment of acquittal entered in United States v. *Standard Coil Products Co., Inc., Fong Foo and Robert Knupp designated on the Criminal Docket of the United States District Court for the District of Massachusetts as CR. 60-6-W, be vacated and ordering that the above case be reassigned by that court for trial before another judge.*

ALDRICH, *Circuit Judge*, (concurring). If I agreed with the court that one could not be sure of the reason why the district court ordered the acquittal I would have to disagree with its conclusion on the issue of double jeopardy. Since the subject is of some general importance, I will state my reasons.

I cannot think that a court is "without power," that is, "without jurisdiction," [1] to order an acquittal in the midst of the government's case on the ground that evidence already introduced is so fatally defective that no jury could be allowed to convict. The court assumes, *arguendo*, that it may sometimes be appropriate for a district court to direct

[1] The court apparently uses "power" and "jurisdiction" interchangeably. Certainly there is no question here about the district court's jurisdiction over the case and over the defendants. Accordingly, I will hereafter use the term "power."

an acquittal prior to the closing of the government's case because of some evidentiary defect, but says it is unnecessary to decide. I do not think one can leave this matter hanging, but, rather, I believe its resolution to be all-important.

Not unnaturally, in view of the fact that the government has no general right of appeal, there is a paucity of authority with respect to the right of the court to acquit for evidentiary defects at any preliminary stage. In *United States* v. *Dietrich*, C.C.D.Neb., 1904, 126 Fed. 676, Circuit Judge (afterwards Mr. Justice) Van Devanter said, at pp. 677-78,

> "Where, by the opening statement for the prosecution in a criminal trial, and after full opportunity for the correction of any ambiguity, error, or omission in the statement, a fact is clearly and deliberately admitted which must necessarily prevent a conviction and require an acquittal, the court may, upon its motion or that of counsel, close the case by directing a verdict for the accused. The court has the same power to act upon such an admission that it would have to act upon the evidence if produced. It would be a waste of time to listen to evidence of other matters when at the outset a fact is clearly and deliberately admitted which must defeat the prosecution in the end."

I see no reason to say the court there erred in applying this well-recognized civil principle to a criminal proceeding. See *McGuire* v. *United States*, 8 Cir., 1945, 152 F. 2d 577, 580. In like manner, in *United States* v. *Maryland Co-operative Milk Producers, Inc.*, D.C.D.C., 1956, 145 F. Supp. 151, an acquittal was ordered when facts were stipulated during the course of the government's case which the court believed precluded any possibility of criminal liability. See also *United States* v. *Weissman*, 1924, 266 U.S. 377, 379.

In the absence of any contrary authority, it seems inherently reasonable to conclude that at whatever stage a fatal deficiency in the government's evidence irrevocably appears, the court is empowered to acquit.[2] Yet it must follow that if the court can make such a decision *in medias res* when its opinion of the damaging effect of particular facts is correct, it can equally do so when its interpretation is incorrect. If a court truly lacked jurisdiction, that would be one thing, but given power to decide, there must be power to decide erroneously. Therefore the question must be, was the nature of the ruling that the court made here so different in kind that it must be said that the court was entirely without the power to make it.

There can be no doubt that even if a court found no conceded fact, as in the *Maryland Cooperative* case, fatal to the government, but nevertheless was of the opinion that the government's evidence was so unreliable and vacillating[3] as to be utterly unworthy of belief, it could order an acquittal at the close of the government's case. The government could not appeal, no matter how erroneous the court's determination. I cannot think that a court is entirely without power to reach the same conclusion before the last witness has testified. It is not always necessary to eat the whole of an egg to know it is rotten. The fact that the court is obliged to put the defendant to the bar, *Ex parte United States*, 1932, 287 U.S. 241, seems a far cry from

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[2] There is some suggestion in the court's opinion that Fed. Rule of Crim. Procedure 29(a), 18 U.S.C., permitting the court to acquit at the close of the government's evidence and allowing the defendant to move at that time without resting, impliedly indicates that the court may not acquit at any earlier stage. The rule contains, however, no positive prohibition to that effect. I believe the rule merely recognizes a common practice, and encourages it by not restricting the right of the defendant to move. See 5 Moore, Federal Practice ¶50.01 [2] (2d ed. 1951).

[3] The district court here (wrongfully, I agree) asserted that the witnesses continually and fundamentally contradicted themselves.

saying that it cannot, in a bona fide attempt to weigh evidence introduced, conclude that what it holds to be a vital part thereof is so irretrievably bad that no jury could properly convict.[4]

Suppose here that instead of ordering an acquittal forthwith the court had stated that under the circumstances then disclosed all of the remaining evidence offered by the government must be excluded as irrelevant. Manifestly, the power to exclude evidence as irrelevant exists at all times. The government, perforce, would then have rested, and the court's power to acquit would have become absolute. In what way was the court's ruling (if the unreliability of the evidence was its reason for acquittal rather than government counsel's alleged misconduct) other than that evidence already introduced so fatally infected the case that all further evidence was irrelevant in the sense that it could not cure the defect? To say that this was done without sufficient consideration is not to say that it was done without power. I believe the court has been misled by the relative magnitude of the district court's error into confusing a difference in degree with a difference in kind.

However, I think that a different question is raised by the other possible reason for the acquittal, the conduct of the Assistant U. S. Attorney in speaking to his witness during the recess. Here the court's assumption, *arguendo*, (note 5) is that "a judgment of acquittal might be warranted in the event that deliberate misconduct of Government counsel is so outrageous as not only to render the trial in progress unfair but also to make a fair trial in the future impossible." I find it difficult to imagine circumstances warranting such an assumption. *Cf. Caldwell* v. *United States*, D.C. Cir., 1953, 205 F. 2d 879, 881 n. 11.

[4] Even accepting in full the government's suggestion that it is entitled to a trial by jury, such trial traditionally includes the right of the court to conclude that the evidence does not warrant submission. See *Patton* v. *United States*, 1929, 281 U.S. 276, 288.

cert. den., 349 U.S. 930. But in all events I agree with the court that it is totally inapplicable.

It must be conceded that it was within the power of the district court to determine, however erroneously, that the conduct of counsel was improper. But I do not think it follows automatically that the court had power to acquit for that same reason. "A criminal prosecution is more than a game in which the government may be checkmated and the game lost merely because its officers have not played according to rule." *Maguire* v. *United States*, 1927, 273 U.S. 95, 99. When a court acquits in the middle of the government's case because of what it believes to be an incurable defect in the evidence, it has made a judgment on the government's case as a whole. A ruling of misconduct, however, is only a judgment as to the procedure in the particular trial. What corrective steps the court should take after its determination of a procedural error is a separate question. To make the same assumption that the court makes in its opinion, that "deliberate," "outrageous" misconduct which would project its unfairness into a future trial would warrant an acquittal forthwith, does not advance the matter, because that is far from our case. The district court made it abundantly clear that the error, as it considered it, committed by the Assistant U. S. Attorney was based upon ignorance of the court's rule,[5] and was anything but deliberate. Nor was any question of prejudice to the defendants possibly involved. The only testimony which the witness had changed as a result of conferring with counsel was the date of a particular conference. The date was a preliminary matter. Nothing about the conference had been admitted in evidence. The present effect of this new testimony upon the trial was nil. Its

[5] An understandable ignorance, since twice before during the trial the court had expressly invited a government witness to confer with counsel during recess about his testimony, and in one instance to "rehearse it with counsel."

future effect was entirely in the control of the court, who could exclude any future evidence relating to this as yet undisclosed conference. Prejudice to the defendants was accordingly nonexistent.

Under these circumstances I do not think the court had any more power to order an acquittal than it would have had on the basis of some rule of thumb that more than three government questions, asked in good faith, but regarded by the court as irrelevant, had unduly delayed the trial.

While courts can do, and must be permitted to do, unwise and even foolish things, I think there must be some limit to naked, arbitrary power. As against a defendant's right to be free from double jeopardy, there is the interest of the public in the prosecution and conviction of criminals. See, *e.g.*, *Green* v. *United States*, 1957, 355 U.S. 184, 216-19 (Frankfurter, J., dissenting). In some instances this has been permitted to override what, strictly, is a second jeopardy, or at least an extended jeopardy. *Cf. Wade* v. *Hunter*, 1949, 336 U.S. 684, 688-90; cases collected in *United States* v. *Gori*, 2 Cir., 1960, 282 F. 2d 43, 48 (dissenting opinion), *cert. granted* 12/12/60. Whatever may be the correct philosophy of judicial power, I am unwilling to think that such a totally arbitrary act in the course of trial with no semblance of justification behind it,[6] should deprive the government of its day in court. This may be an exceptional ruling, but this is an exceptional case.

Since I think different consequences flow from the two suggested grounds of the district court's acquittal, it is essential to determine, if possible, which one was the actual basis of its action. With all respect, I do not share the court's expressed uncertainty. As soon as it appeared why

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[6] Unless one wanted to say it was to teach government counsel a lesson for not knowing the rules—which is scarcely a judicial function. It would be doubly inappropriate here in view of the court's prior instructions. See n. 5, *supra*.

the witness had changed his testimony the district court excused the jury and asked the Assistant U. S. Attorney, "As a matter of personal privilege do you want to make any statement?" The court stated that in talking to his witness counsel had violated an "elementary rule," and that it was "interested in whether this is a situation in which I must respond to a motion." The court then described counsel's conduct as "a violation of civil liberties." Subsequently the court called the jury, stated that counsel were acting "subjectively in good faith [but that] the standards of a criminal prosecution in the United States require a constant awareness of the rights and liberties guaranteed by the United States Constitution." It is true that thereafter the court mentioned the government witnesses' "lamentable lack of awareness or lack of capacity in connection with their testimonial obligations," and discussed the case generally. But it returned at some length to counsel's conference with the witness, discussed extorted confessions, unlawful search and seizure, and "the duty of a court to see that every man gets a fair trial," and concluded, "Bearing in mind these principles, and responding to the motions for acquittal made by counsel . . . , I direct you at this stage to return the verdicts of acquittal. . . ."

It may be that the district court would not have conceived of this "elementary rule" if it had not already been annoyed with the believed testimonial deficiencies of the witnesses, but I have no reluctance in concluding that the reason it granted the motions for acquittal was the same one that caused it to invite them—namely, counsel's violation of the "rule." Accordingly, I concur in the judgment of the court.

ORDER OF COURT

February 2, 1961

This cause came on to be heard on petition for writ of mandamus and was argued by counsel for petitioner and for intervenors.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The petition for a writ of mandamus is granted and the writ is hereby issued directing that the judgment of acquittal entered in United States v. Standard Coil Products Co., Inc., Fong Foo and Robert Knupp, designated on the Criminal Docket of the United States District Court for the District of Massachusetts as Cr. 60-6-W, be vacated and ordering that the above case be reassigned by that court for trial before another judge.

By the Court:
ROGER A. STINCHFIELD, Clerk
By /s/ DANA H. GALLUP,
Chief Deputy Clerk.

APPENDIX "B"

United States District Court

DISTRICT OF MASSACHUSETTS

Crim. No. 60-6 — WYZANSKI, D. J. and a Jury

UNITED STATES OF AMERICA

v.

STANDARD COIL PRODUCTS CO., INC., *et al.*

APPEARANCES:

GEORGE CANER, ESQ. and
JOSEPH MITCHELL, ESQ.,
for the government

JAMES ST. CLAIR, ESQ. and
SAMUEL ANGOFF, ESQ.,
for the defendants

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* * * *

FIFTH DAY

Court Room No. 6
Federal Building, Boston
September 14, 1960

* * * *

[Transcript, pp. 370-84.]

The COURT. The jury is excused.

(The jury leaves the court room at 10:55 a.m.)

The COURT. If there is any press reporter in the court room what I now say is of course subject to being reported

after the trial is over, but I want to be very clear it does not get into the newspapers during the trial. I shall treat it as a contempt if it gets into the newspapers due to the deliberate defiance of my instructions. So I now am telling all of you that of course at an appropriate later time you can say what you like about what goes on now but you are not to say it to anybody for the purpose of it being reported in a newspaper during the trial because I do not want what I am going to say to reach the jury under any circumstances.

First of all, I am going to ask Mr. Caner and Mr. Mitchell: Is there any other principal Government witness with respect to the kind of items which have been covered by the witness on the stand, Mr. Palliotto?

Mr. CANER. There is one, yes, your Honor.

The COURT. Is he one whose credit in your opinion will stand better after examination than this witness' credit?

Mr. CANER. I think his credit will be good, your Honor.

The COURT. I didn't ask you that.

Mr. MITCHELL. Your Honor, I think that Mr. Palliotto is just a little confused.

The COURT. A little confused? This has gone on for two or three days. I am going to tell you that if I were the United States Attorney in this case and my principal witness were testifying as this witness has done I would forthwith nol pros the case.

Mr. CANER. If the Court please, this witness was put on to testify simply to give explanatory material. This witness was not put on at this stage to testify to any matters concerning the fraud. It may be, and it obviously is, that his explanations have not been as clear as they might be. But, if the Court please, he is not our principal witness by any stretch of the imagination.

The COURT. There are all kinds of character in a lawyer. One of them is the kind of character which enables him to realize in what situation a witness for whom he is not responsible has placed his case, and it is the

responsibility of the United States Attorney and his assistants to reflect whether the great interests of justice, which are their primary concern, are served by a prosecution which depends upon a witness of the character that this witness has revealed on the stand.

I will take a 15-minute recess for the purpose of enabling the United States Attorney and his assistants to consider whether the public interest is served by a further prosecution of this case.

(Recess.)

[Jury excused.]

[Conference at the bench at which the following was recorded:]

The COURT. I note that Mr. Richardson has joined the government counsel, and I am going to undertake very briefly to state to him as well as to other counsel why I have done the, for me, entirely unprecedented thing of asking the United States Attorney to consider whether to nol pros the case at this stage.

The cold record perhaps inadequately conveys the total picture as it has developed in the last few days of testimony, and in particular the testimony of the witness Palliotto, who is on the stand.

A judge ought not to deceive himself into believing that he knows how a jury will act. Yet I feel reasonably confident, and I believe my confidence is shared by Mr. Duwan, the Clerk, who has sat through the trial and who is, like myself, a neutral and a person of some experience in the court, that there is no chance whatsoever that this jury would convict these defendants if a conviction required any credit of Mr. Palliotto.

I make no statement as to whether the defendants are guilty or not guilty, and I will make it clear that I am in no way casting any reflection on the United States Attorney

or any of his assistants, including most specifically Mr. Caner and Mr. Mitchell. I am not doubting any of the proceedings before the Grand Jury. I am looking merely at the situation in which this Court and Jury are presented with the testimony of a man who may intend to tell the truth but seems absolutely incapable of so testifying as to persuade neutral persons that he has a mind with a discriminating capacity to observe, the strength to remember, the skill to narrate, and the total awareness of the proceedings in which he, and more particularly the defendants, find themselves.

If it were not so serious a matter, it would be humorous to refer to the kinds of things which this witness has said. On one occasion he will give an answer in the affirmative, and a few minutes later when the situation is really not changed in any respect he takes a diametrically opposite position. He seems not to realize the ambiguity his testimony has created. He seems to be unresponsive to repeated warnings by the Court that there could be no more serious matter than the offering of testimony in a criminal case, and that the witness should pause and reflect if he is in doubt, but should not plunge himself and the rest of us into a series of confusions.

So far as his narrative ability goes, he has been responsible for some of the most humorous blunders that I remember. He referred to the signals which were being given by Exhibit 1, the radiosonde, as "spurious." What he meant, as it finally developed, was that they were signals which were given on the spur of the moment, that is to say, instantaneous. The misuse of the word "spurious" in a case in which one of the important allegations in the indictment is that there were frauds committed upon the government in connection with the testing system, rises to a degree of risk to the defendants to which they ought not to have been subjected.

I am not in any way intimating that this was the fault

of the United States Attorney or his assistants. It just stands as a dramatic instance of the unawareness of the witness as to what his testimony means in a case like this.

Again a strange misuse of language, which I think did not prejudice, was his reference to "virgin women's hair," by which he meant the hair of a woman which was not dyed.

A witness who has so little understanding of the language and who has so frequently made utterances which have confused the Court, and I feel quite certain the Jury, is a very slender reed on which to make a man's fate depend.

Now, I know I have heard only four days of testimony, and I am aware that sometimes, as Thomas Dewey as District Attorney illustrated, one must secure convictions on the testimony of prostitutes, pimps, and worthless people. One may have no choice but to proceed on the basis of persons of poor character and worse reputation. But in general when such convictions have been secured they have been because though men and women have been worthless outside the court room, they have seemed to be creditable or worth believing in the court room.

I can't feel that any trust could be placed in this witness, and if in the end the Jury did believe this witness, I think it would be almost inevitable that I would have to set aside the verdict as not being a verdict which could be granted full credit as being a verdict based upon evidence beyond a reasonable doubt.

Mr. Duwan, have I really overstated your position? Never mind whether you agree with every paragraph I have said, but have I overstated your position?

Mr. DUWAN. No, not at all.

Mr. RICHARDSON. May I comment briefly before I ask Mr. Caner to comment on the basis of his more detailed knowledge of the government's case?

I think in the first place we should make it clear that this witness was called for a limited purpose not central to

establishment that wrongdoing had occurred. As I understand his testimony, it was to have attempted to explain the nature of the tests that were to be used under the terms of the government's contract on procuring these radiosondes.

The government would rely entirely on other witnesses to show that those tests were not carried out, and in fact they were falsified.

We believe, therefore, that whatever the Jury's impression of this witness generally, that its judgment as to whether the defendants are guilty would and should rest upon testimony of witnesses who will testify that under the instructions of the defendants they did not follow the procedures prescribed and that they in fact falsified those procedures.

Would you like to supplement that, Mr. Caner?

Mr. CANER. I would like to say that I think the case could well have proceeded by introduction of the documents, particularly the specification, which set forth the test procedures, and then the fraud witnesses could have been called. My purpose in calling Mr. Palliotto was to explain just how primarily the testing procedures were supposed to work, because it did not seem to me that by just simply reading the printed document the Jury could understand how the test procedures were supposed to be operated.

The COURT. Mr. Caner, you are not on trial. I don't want you to think I have made any criticism of the way you choose to present the matter.

Mr. CANER. I don't infer that. I address myself to the point that this witness testimony is not material to anything relating to the fraud charged in this case. The witness was called to explain it. He has not done a good job of explaining, I grant you that, but the specifications themselves set up the procedure. I think that at least the way the test was supposed to have been operated has been ex-

plained, perhaps not perfectly, but it has been explained, and even if it hasn't been explained it is set forth in the specifications.

This witness was not to be our primary witness. I had not anticipated by any stretch of the imagination that he would take this long. The fraud witnesses are here, they have been here for many days, they are the ones who will prove the case against the defendants.

The Court has not heard one-tenth of the testimony in this case, and none of the fraud testimony. I do not think that this witness' testimony has to be believed in any degree in order for a conviction to stand, because the documents, as I say, do speak for themselves as to the test procedure, although not well enough to instruct the Jury, not knowing the instrument, just how test procedures were conducted.

Therefore, it is my view that the witness' testimony is not material to the fraud, and that I would be derelict in my duty in not proceeding with the case.

Mr. RICHARDSON. I might add that I did keep in fairly close touch with the presentation of this case to the Grand Jury, and would simply like to underline in the light of that degree of exposure to the case that what Mr. Caner says about the importance to the government case of the fraud witnesses who have not yet been heard, is basic, and I therefore feel that to draw a conclusion based upon the testimony of this witness would not fairly give the government an opportunity to present to the Court and Jury the evidence on which the Grand Jury proceeded in charging these defendants.

The COURT. I want to make it absolutely clear that I am going to allow the government to go ahead. I want further to make it absolutely clear that neither now nor previously have I intended to suggest that the defendants are innocent or not guilty. Neither now nor previously have I intended to suggest that the Assistant United States

Attorney, Mr. Caner, or the Assistant United States Attorney, Mr. Mitchell, or anybody else, has been at fault or negligent, or failed to exercise such professional skill as the case required.

All that I have said is that regardless of what other witnesses testify with respect to the merits of the alleged fraud, I do not believe that there is a chance that this Jury will convict these defendants, and that you can suppose that Mr. Duwan and I have at least sat often enough in criminal cases to know that whether the United States Attorney was innocent or not, whether he was skillful or not, the impression created is now ineradicable in our view. Isn't that right, Mr. Duwan?

Mr. DUWAN. So far.

Mr. RICHARDSON. With full deference to Mr. Duwan, and conceding that a jury asked now to vote——

The COURT. I didn't say asked now. I am talking about whether it will be overcome.

Mr. RICHARDSON. I think they may feel when they have heard the fraud witnesses that the perspective that they then have on the testimony of this witness is totally different.

The COURT. The unfortunate thing from the government's point of view is that this witness has been on the stand now for four days. No one can overlook the fact that in spite of all instructions to jury, they don't hold their minds in absolute suspension, and no one can think the judges do.

Mr. RICHARDSON. I might say in that connection that it had never been anticipated by the government that a witness called for such a purpose would be on the stand for this length of time, and in our view a great deal of the testimony that has been elicited during that period is not material to the government's case.

The COURT. In my view the difficulty there would re-

quire me to make a professional comment, which I would rather not do, but I invite you to read the transcript.

Mr. ST. CLAIR. The matter of procedure raises its head. I haven't examined this witness at all on any alleged fraud, because it was represented to me that he would be recalled for that purpose as a government witness. Now, if I understand he is not to be recalled for that purpose, I am going to spend the next couple of days with him on what he alleges was the fraud, because he was the government man in charge.

The COURT. That is quite correct. You were told, as I was told, that the witness would be called twice, once in connection with what was more or less background of the whole testing procedure, and once with respect to specific knowledge of specific fraud.

Mr. CANER. Yes, and we propose to do that, your Honor.

Mr. ST. CLAIR. Then he will be called later with respect to the alleged fraud?

The COURT. Yes. I am glad that the transcript is being typed out currently.

Mr. RICHARDSON. I will look at it with interest, your Honor.

The COURT. All right, bring the Jury down.

[The Jury returns to the court room.]

* * * *

EIGHTH DAY

Court Room No. 6
Federal Building, Boston
Tuesday, September 20, 1960

* * * *

[Transcript, pp. 707-18]

The COURT. I will excuse the jury for a moment.

(The jury leaves the court room at 10:18 a.m.)

The COURT. Mr. Caner, as a matter of personal privilege do you want to make any statement?

Mr. CANER. As a matter of personal privilege?

The COURT. Before I take action?

Mr. CANER. All I can say is that I have never known of any principle that I could not speak to a witness.

The COURT. In the course of his testimony to induce him to change his testimony and to do it outside of court?

Mr. CANER. I had never known of any reason why I couldn't talk to a witness and ask if his testimony on a particular point was accurate. Nobody has ever said to me that that was improper, and I am completely astonished that the Court should think it was improper for me to have talked with the witness concerning his testimony.

The COURT. (To the witness) You had better leave the room for a moment. I have directed the witness to leave the room.

(The witness leaves the court room.)

Mr. CANER. There is no way I know of to prepare a case other than talk to a witness.

The COURT. This has nothing to do with the preparation of the case. This is *in medias res:* while the witness is on the stand during a recess counsel speaks with him privately about his testimony.

Mr. CANER. I had never known anything improper about that, your Honor.

The COURT. You will very soon learn. Is there anything else you want to say as a fact about this matter?

Mr. MITCHELL. Well, your Honor, it was partly at my suggestion that Mr. Caner questioned him concerning this.

The COURT. You were here and you knew he was on the stand. You knew there was a recess. You know the principle that a witness must be examined in public. You know that, without suggesting for a moment that you offered any improper inducement, tampering with a wit-

ness is one of the most dangerous things in connection with a case, and particularly a criminal case, that a person should be left entirely alone during the course of his testimony. You must know that elementary fact and elementary rule.

Mr. MITCHELL. We wanted the truth to come out, your Honor.

The COURT. Thank you. I am glad that the truth has come out.

Mr. CANER. Your Honor, I went to disclaim any intention or act of tampering with the witness.

The COURT. It depends upon what you call tampering. The facts speak for themselves.

Is there any other fact I haven't had called to my attention?

Mr. CANER. I do not want Mr. Mitchell to share the blame on this matter, your Honor.

The COURT. I am not proposing to take any disciplinary action against you or against Mr. Mitchell. I am merely interested in whether this is a situation in which I must respond to a motion.

Mr. CANER. Well, if the Court please, the matter which I talked to him about in regard to the date is a matter that other witnesses will testify to, concerning when it happened. It can be ascertained when it happened.

The COURT. Surely it can be ascertained by examination in public. I haven't any doubt that he can properly have his attention called in public to errors, and suggestions can be made to him as to the impropriety of dates.

But this was done, according to your testimony and the witness', outside of court, either in the office of the United States Attorney or somewhere like that.

Mr. MITCHELL. Your Honor, would it help you if we told you exactly what we said to the witness concerning this matter?

The COURT. I told you you could make any statement

you want to make. I haven't prevented your stating any facts you deem to be relevant. I am not talking about arguments; I am talking about facts.

Mr. CANER. Well, I asked the witness whether the discussion with Teichman was before or after the FBI investigation, and whether he made the statement in the course of the FBI investigation.

I showed him the statement, and he observed the date on the statement. I then asked him what was his best memory as to the date at which the conversation with Teichman took place, and he stated that it was September of 1957. That was what happened, and I have never been aware of any impropriety of doing such a thing, your Honor.

The COURT. I didn't mean that you were personally deliberately doing something you knew to be wicked. I am merely inquiring as to what the facts were, and whether that constitutes such a prejudice to the defendants, quite apart from your intent, as to create a situation in which the Court must act in response to a motion.

Mr. CANER. I submit, your Honor, that no prejudice to the defendants arises, because the true facts will come out during the course of trial as to when the discussion occurred.

The COURT. This is the argument which prosecutors always make with respect to every violation of civil liberties, whether it is a violation of the Fourth Amendment or a violation of the Fifth Amendment, or anything else, that this is the way to discover the truth, never mind the means.

Mr. CANER. Well, if the Court please, I submit that the point is—the actual time is not a point on which the case swings.

The COURT. It happens to be of the greatest importance, because I gave you a recess for the very purpose of laying the proper foundation, if one could be laid, with regard to the admission of what you regarded, and I take it the defense regarded, as a significant or potentially sig-

nificant piece of testimony, which had to do with whether there was a continuous conspiracy involving the attorneys, other officers of the corporation, other co-conspirators alleged in the indictment, and the defendants on trial. It was the very heart of one part of the case.

Mr. CANER. The Court said we could prove it aliunde.

The COURT. Yes, and I am trying to point out that the whole nub of one aspect of the case turns on whether indeed there was a co-conspiracy, and that you sought to prove this by testimony of the conversation in which an attorney participated. The date of that conversation was of the greatest consequence. The date of that conversation was covered in the direct testimony yesterday and was the subject, by your own admission, of an out-of-court discussion with the witness while he was on the stand, a few minutes before the opening session of the court. I think I have fairly stated what the problem is.

Mr. ST. CLAIR. If your Honor please, I assume that my brothers are finished. I don't by any means intend to infer any conscious wrongdoing.

The COURT. I think it should be made clear one hundred per cent on the record that nobody thinks either Mr. Caner or Mr. Mitchell, being fully aware of the canons and proprieties of the situation, deliberately flouted them in order to do an injustice. No one thinks they had a wicked intent.

Mr. ST. CLAIR. That is right. However, it should be brought out on the stand in direct examination if it was felt that the date was wrong.

However, it does put the defense in a very difficult position to try a case under these circumstances. I don't know how much has already gone on in this respect. I am certain no more of it will go on, but it would seem to me at the very most your Honor might entertain a motion for acquittal, which I now make on behalf of the corporation, and

at the very least you ought to strike the testimony of this witness.

Mr. ANGOFF. I now make on behalf of the individual defendants Robert Knupp and Fong Foo a motion for judgment of acquittal.

The COURT. Do you want to be heard?

Mr. CANER. Yes, if the Court please. I submit that the very most that should be done in regard to these motions is to strike the testimony of the witness, or such portion of his testimony as the Court feels has been prejudiced by what the Court states was not proper.

And in the public interest, I submit that the case should not be dismissed on account of the incident that has just occurred. There are many witnesses to be heard from, many more besides this witness. We have not heard the testimony of any of the test operators. We have only heard three witnesses in a case involving many witnesses.

I submit that at this stage to dismiss the case would make it doubtful that justice would be done.

The COURT. Will you call the Jury, and the witness will take the stand.

[The Jury returns to the court room, and the witness resumes the stand.]

The COURT. Mr. Foreman and Members of the Jury, before I say anything else, let me make it absolutely clear that counsel for the defendants as well as the Court are persuaded that neither the United States Attorney nor either of his assistants consciously or deliberately violated any canon with which they were familiar. They were acting subjectively in good faith, and I do not mean at any stage of the remarks I am about to make to criticize them in the sense that I believe that they were conscious wrongdoers.

On the other hand, a criminal prosecution is the most solemn proceeding which takes place in a court, and one of the most solemn activities with which man could be concerned on earth. The standards of a criminal prosecution in

the United States require a constant awareness of the rights and liberties guaranteed by the United States Constitution, and a constant sensitivity with respect to the value of an open trial conducted with a full protection of the rights of any individual or any corporation summoned to answer a criminal charge.

In the case before you there have been a number of difficult problems, and I have no question that you have been presented with witnesses who were the best that the government could offer, but they were witnesses who on the stand showed a lamentable lack of awareness or lack of capacity in connection with their testimonial obligations.

Frequently during the trial of this case I have had to do what I never did before in eighteen and one-half years, remind the witnesses of the solemnity of their function, and the necessity that they should recall accurately and state accurately the testimony which they were giving in matters of the utmost significance.

Were I not engaged in such a serious set of remarks to you, I would be tempted to rest upon a story which Chief Justice Wilkins told at the Judicial Conference, somewhat different from the one that I recited to you the other day. He referred to a case tried by Judge Otis Lord of the Superior Court of the Commonwealth of Massachusetts in the middle of the 19th century, and he said that after the most fluctuating kind of testimony by witnesses in that criminal case Justice Lord in addressing the jury said, "I think it would be sufficient if I instructed you that if you believe the witnesses for the government you will convict the prisoner; if you believe the witnesses for the prisoner, you will acquit him; if, like myself, you do not believe either of them you will then acquit the prisoner because the government has the burden of proof beyond a reasonable doubt."

And though that story may seem to you to be humorous,

I think you will also say that it has unilateral application to the difficulties which we have faced in this case.

That is not to say that the difficulties were created by the United States Attorney or his assistants. They were faced by them. It is in the atmosphere of this fluctuating testimony that yesterday afternoon we had testimony on a most vital point given by Mr. Rosenholm. You cannot fully appreciate how vital, because you haven't read the text of the indictment and I have not hitherto had any occasion to discuss with you the problem of conspiracy, which is one of the essential elements in a part of this indictment. And you don't know, as I do, that the prosecution was endeavoring to show that a lawyer, together with others not named as defendants, together with the defendants, conspired to defraud the United States, that in this connection the admissibility of the testimony depended to a very considerable extent upon the date of an alleged conference in which the attorney participated. But you did hear that that date was given by this witness, Mr. Rosenholm, on the stand yesterday, and that I declared a recess yesterday afternoon in order that the government might be fully prepared to lay a foundation for the admissibility of the testimony that it relied upon with respect to this alleged conspiratorial conference.

During the recess, and without in any way being conscious of a potential violation of any canon of ethics or any rule or principle, the Assistant United States Attorneys in this case admittedly conferred with this witness who was on the stand, and the conference with him took place either in the offices of the United States Attorney or in some similar place. It took place this morning before court, not under the supervision of a judge, and without the presence of the defendants or counsel for the defendants.

In this situation the witness took the stand this morning and on this very vital point gave an altered version in which the date now given becomes quite significant and has

a connotation and importance which the date he gave yesterday did not have.

He is a witness who already has shown either a lamentable lack of memory or an extraordinary power of inventiveness, as you will recall in connection with the cards where he gave a whole series of answers which he withdrew.

With due regard for the principles of justice under law, I must bear in mind not only what may be correct, but what is fair. In our constitutional system, under our jurisprudence, many things which are true are not allowed to be shown. Examples are a confession extorted by physical coercion; such a confession is not admissible although it may be perfectly correct and the defendant may be guilty. Likewise, information procured by an unlawful search and seizure may be prefectly true and the defendant may be guilty; nevertheless it is well settled that no conviction can be based lawfully upon information unconstitutionally procured by an unreasonable search or seizure.

These principles illustrate the sensitivity of American courts to fair play in connection with every aspect of the criminal law. It is not the duty of a court to see that every guilty man is punished. It is the duty of a court to see that every man gets a fair trial. The highest public interest is not the punishment of the wicked, but the establishment and maintenance of justice under law.

Bearing in mind these principles, and responding to the motions of acquittal made by counsel for the indivividual defendants and the corporate defendant, I direct you at this stage to return the verdicts of acquittal with respect to each of the individuals and with respect to the corporation.

[The Court then heard requests of Jurors to be excused.]

The COURT. The defendants will stand. [The defendants complied.] You have been acquitted by direction of the Court and by the Court. Your bail is terminated. You are free.